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In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LORRAINE POLASKI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondents' attempt to justify the exercise of jurisdiction by the courts below over the claims of thousands of class members who did not exhaust their administrative remedies is without merit. The underlying issue respondents have raised in this case concerns the weight that the state agency or an administrative law judge (ALJ) should give to a particular class member's subjective allegations of pain in determining whether he is disabled. Respondents therefore challenge the interlocutory resolution of the merits of each class member's entitlement to disability benefits. This Court's decisions make clear, however, that a person may obtain judicial review under 42 U.S.C. 405(g) with respect to an issue that bears on the merits of his claim for benefits only after he has fully exhausted his administrative remedies through the Appeals Council stage. The courts below thus plainly had no authority to grant relief to any

individual who did not personally satisfy this jurisdictional prerequisite.

The exhaustion issue in this case is essentially identical to that presented in *Heckler* v. *City of New York*, cert. granted, No. 84-1923 (Oct. 7, 1985), and it also is related to the exhaustion issue presented in *Heckler* v. *Owens*, appeal pending, No. 84-1905. We have suggested in the petition for a writ of certiorari (at 12-13, 16) that plenary review is not required in this case as well and that the petition instead should be held and disposed of in light of the Court's ultimate disposition in *City of New York* and *Owens*. Respondents agree (Br. in Opp. 13) that plenary review is unnecessary here and that the petition should be held pending a disposition in those cases if the Court does not deny certiorari. Accordingly, we shall respond only briefly to the points raised by respondents.

1. Respondents contend (Br. in Opp. 11-12) that the impact of the decision below is "limited" because it affects only a "relatively small group of individuals." This is a remarkable assertion. The judgment below requires the Secretary to provide for the reopening of approximately 9,000 cases. See Pet. 12. When this burden is added to that imposed by similar readjudication orders in numerous other class actions involving thousands of claimants who likewise abandoned their claims for benefits, the magnitude of the judicial intrusion into the administration of the Social Security disability programs is enormous.

2. Contrary to respondents' contention (Br. in Opp. 15-27), the case-by-case balancing approach to the exhaustion issue they advocate finds no support whatever in this Court's decisions in *Mathews* v. *Eldridge*, 424 U.S. 319, 330-332 (1976), and *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 14-16. The Court in *Eldridge* and *Ringer* simply recognized a narrow exception to the requirement of

full exhaustion for circumstances in which the claimant raises a legal issue that is "entirely collateral" to his substantive claim for benefits and that would be lost (and thereby cause irreparable injury) if judicial review were postponed until after a "final decision" on the merits of his claim for benefits. As we have explained in the petition for a writ of certiorari (at 20-22) in *City of New York*, that exception plainly has no application with regard to an issue, such as the manner for evaluating complaints of pain, that directly affects the merits of a claimant's entitlement to benefits.

3. Respondents' contention (Br. in Opp. 27-33) that the Eighth Circuit correctly dispensed with the exhaustion requirement because the Secretary had "nonacquiesced" in circuit precedent regarding the evaluation of pain is misleading. The court of appeals made no finding of nonacquiescence, and the agreement between the parties regarding the appropriate standards for evaluating pain, which was approved by the court on July 17, 1984 (Pet. App. 27a-31a), made it unnecessary for the court even to address that question (*id.* at 3a). Moreover, the Secretary has maintained throughout this litigation that her position regarding the evaluation of pain under prior law was fully consistent with Eighth Circuit precedent, and the agreement approved by the court of appeals on July 17, 1984 in fact reflected the Secretary's view of the law (*id.* at 28a, 31a). These circumstances refute any suggestion that the Secretary had adopted an official policy of "nonacquiesing" in Eighth Circuit precedent concerning the evaluation of pain.

Contrary to the impression respondents seek to convey (Br. in Opp. 8, 32), it also is clear that the Secretary did not concede that an incorrect standard for the consideration of pain had been generally applied in administrative proceedings on the class members' claims. The July 17, 1984 agreement, in which respondents concurred, stated only that "some adjudicators" had misinterpreted the formal Social

Security Ruling on the subject of pain. See Pet. App. 29a. The fact that an error might have been committed in some individual cases scarcely furnishes a basis for the courts below to require that the Secretary provide for the reopening of *all* prior decisions in which the claimant alleged that he experienced pain.

4. Respondents concede (Br. in Opp. 33-35) that the decision below conflicts with the Fourth Circuit's decision in *Hyatt* v. *Heckler*, 757 F.2d 1455, 1460 (1985), petition for cert. pending, No. 85-474 (filed Sept. 19, 1985). But respondents argue that this conflict does not require resolution by this Court because, in their view, the two courts of appeals agreed on the legal test to be applied and disagreed only in its application. This is plainly incorrect. The Fourth Circuit in *Hyatt* expressly held that exhaustion could not be dispensed with under the exception recognized in *Eldridge* and *Ringer* unless the legal issue involved is "wholly" collateral to the class members' claims for benefits, while the Eighth Circuit in this case held that the legal issue need not be wholly collateral in order for a court to dispense with the exhaustion requirement under *Eldridge* and *Ringer*. See Pet. App. 23a. The petitioners in *Hyatt*, unlike respondents herein, argue that resolution of this conflict is warranted. See 85-474 Pet. 17-18 n.14, 22. We agree, but in our view *City of New York* and *Owens* are fully adequate vehicles for that purpose.

5. Finally, respondents disagree (Br. in Opp. 35-39) with our submission (Pet. 14-15, 16) that the Court should vacate the judgment of the court of appeals, except insofar as that judgment remanded the cases of the terminated class members to the Secretary pursuant to Section 2 of the Social Security Disability Benefits Reform Act of 1984 (1984 Act), Pub. L. No. 98-460, 98 Stat. 1794. The disposition we suggest would have the salutary effect of vacating the court of appeals' construction of Section 3 of the 1984

Act (98 Stat. 1799), which addressed the question of the manner in which pain should be evaluated. See Pet. 10; Pet. App. 14a-17a. The Secretary should first be given the opportunity to interpret and apply that new statutory provision, either by regulation or in the course of the adjudication of individual claims, before a court presumes to impose its own construction.

Respondents maintain (Br. in Opp. 36-37) that the court of appeals properly could consider the interpretation of the new pain standard in Section 3 of the 1984 Act in connection with its consideration of the claims of the two class representatives, Polaski and Blaschko, because these two claimants at least had exhausted their administrative remedies. What respondents ignore, however, is that Polaski and Blaschko both were persons whose benefits had been terminated and who therefore were covered by the special remand provisions in Section 2 of the 1984 Act and by the court of appeals' remand order pursuant to that Act. See Pet. 5 n.3, 9, 15 n.9. Any question concerning the evaluation of pain in the cases of Polaski, Blaschko or other class members whose benefits were terminated therefore must first be raised in the course of administrative proceedings under Section 2 of the 1984 Act. See Supplemental Brief for the Secretary (at 9 n.9) in *Heckler* v. *Kuehner*, No. 83-1593 (Nov. 5, 1984). There has been no finding that any class members *other* than Polaski or Blaschko exhausted their adminsistrative remedies (see Pet. App. 19a), except for those claimants who might have filed their own individual actions under 42 U.S.C. 405(g) (see Pet. App. 18a; Br. in Opp. 38). As to the latter claimants, however, the pain issue should be considered in their individual actions under 42 U.S.C. 405(g), not in this class action in which there is not even a class representative by virtue of the mandatory remand of the cases of Polaski and Blaschko.

Particularly in the absence of any remaining class representative, this class action should not be permitted to proceed. This suit was filed to challenge the evaluation of pain under *prior* law, which has now been replaced by Section 3 of the 1984 Act. The court of appeals' peremptory efforts to give a binding judicial interpretation to the new pain provisions in the 1984 Act that the Secretary has not yet had an opportunity to interpret and apply should not be permitted to have controlling effect in the Eighth Circuit.

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, the petition in this case should be held pending the Court's disposition in *Heckler* v. *City of New York*, cert. granted, No. 84-1923 (Oct. 7, 1985), and *Heckler* v. *Owens*, appeal pending, No. 84-1905. If the Court subsequently grants the petition in light of its disposition in those cases, it should vacate the judgment below and remand with instructions to dismiss the complaint, except insofar as the judgment of the court of appeals already has ordered the remand to the Secretary of the cases of those class members whose benefits were terminated and who therefore were covered by Section 2 of the Social Security Disability Benefits Reform Act of 1984.

Respectfully submitted.

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